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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC., DAVID O. SIMON, TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Contrary to respondent's contention (Br. in Opp. 1, 4-6), this Court's decision in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), does not address the question presented here. The question presented here is whether Section 106(c) of the Bankruptcy Code (11 U.S.C. 106(c)) authorizes an award of monetary relief against the federal government. In contrast, *Whiting Pools* concerned the authority of a bankruptcy court to order the Internal Revenue Service to turn over to the estate property that the IRS had seized from the debtor to satisfy tax liabilities.[1]

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[1] In *Whiting Pools*, the IRS seized a company's tangible property – "equipment, vehicles, inventory, and office supplies" (462 U.S. at 200) – to satisfy the company's tax liabilities. As this Court's opinion emphasized, the business retained ownership of the property after the IRS gained possession of it. *Id.* at 200, 211. Under these circumstances,

Whiting Pools did not involve an award of monetary relief, and no issue of sovereign immunity under Section 106(c) was presented or discussed. *Whiting Pools* thus does not control here.[2]

2. Respondent is incorrect in asserting (Br. in Opp. 14) that there is "no[ ] real" conflict between the Sixth Circuit's decision in this case and the Eighth Circuit's decision in *SBA* v. *Rinehart*, 887 F.2d 165 (1989). Those decisions directly address whether Section 106(c) authorizes an award of monetary relief against the United States and come to opposite conclusions. The Eighth Circuit in *Rinehart* applied the analysis of the plurality in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), to hold that Section 106(c) does *not* waive the federal government's sovereign immunity from monetary relief. 887 F.2d at 166-170. The Sixth Circuit here applied the analysis of the dissent in *Hoffman* to hold that Section 106(c) *does*

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the Court held, a bankruptcy court could order the IRS to turn the property over to the estate pursuant to Section 542(a) of the Code. 462 U.S. at 209-211. 11 U.S.C. 542(a) provides in relevant part:

> [A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

[2] *Whiting Pools* is relevant insofar as the Court upheld an injunctive-style order of the sort that in our view is permissible under Section 106(c). As we explained in our petition (Pet. 16-18), Section 106(c) authorizes courts to make binding determinations regarding the government's rights as a creditor of the estate. The order at issue in *Whiting Pools* amounted to a determination that the IRS "[was] require[d] * * * to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize." 462 U.S. at 212.

authorize monetary relief against the federal government. The conflict is obvious and direct.

Respondent concedes (Br. in Opp. 15) that the *Rinehart* court "concluded that the *Hoffman* [plurality's] analysis 'is equally applicable to a waiver of sovereign immunity by the federal government'" (*Ibid.* (quoting *Rinehart*, 887 F.2d at 170))—a conclusion directly at odds with that of the Sixth Circuit here. Respondent nonetheless asserts that the *Rinehart* court could have decided the issue before it without reaching the sovereign immunity question, by holding that the Bankruptcy Code provision on which the claim for monetary relief there was based—the automatic stay provision (11 U.S.C. 362)—does not contain any of the trigger words on which the applicability of Section 106(c) depends. Br. in Opp. 15. Respondent observes (*id.* at 16) that this alternative rationale was used by the Ninth Circuit in *In re Pearson*, 917 F.2d 1215 (1990), petition for cert. pending, No. 90-1208, to deny a claim for money damages against the United States.

Respondent's argument does not dispel the conflict that exists between the Sixth and the Eighth Circuits with respect to the issue presented here. First, respondent's argument assumes that *Pearson* was correctly decided; that assumption is premature given the request for further review of *Pearson* pending before this Court, No. 90-1208.[3] Moreover, respondent's reliance on *Pearson* is particularly unwarranted in light of the Ninth Circuit's statement in that case that "the plurality's reasoning [in *Hoffman*] is equally applicable to the immunity of the United States." 917 F.2d at 1216. That conclusion squarely contradicts the Sixth Circuit's conclusion in this case.

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[3] The United States has filed a brief with this Court in *Pearson* stating that, while we agree with the Ninth Circuit's decision in that case, we believe the petition should be held pending disposition of our petition in the present case.

3. Respondent unwittingly refutes its own argument (Br. in Opp. 16-18) that the question presented here arises too infrequently to warrant further review. As respondent admits, "numerous" courts have addressed the scope of federal sovereign immunity under Section 106(c) (Br. in Opp. 24 n.8), and "[n]umerous other courts" have specifically considered whether the reasoning in *Hoffman* controls on this issue (*id.* at 22 n.7). The decisions cited by respondent more or less support the Sixth Circuit's decision in this case. Other decisions squarely conflict with the decision below.[4]

As explained in the petition (Pet. 6-8, 11-13), this conflict among the lower courts results from the fact—acknowledged by respondent (Br. in Opp. 20)—that no interpretation of Section 106(c) commanded majority support in *Hoffman*, and that the scope of *federal* sovereign immunity was not directly addressed. In light of the United States' frequent status as a creditor in bankruptcy proceedings, the present conflict among the lower courts over the scope of federal sovereign immunity under Section 106(c) should be resolved by this Court.[5]

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[4] *In re Woloschak Farms*, 109 Bankr. 736 (N.D. Ohio 1989); *In re Academy Answering Service, Inc.*, 100 Bankr. 327 (N.D. Ohio 1989); *In re Cowart*, No. 88-40382, Adversary No. 90-4093 (Bankr. S.D. Ga. Dec. 4, 1990); *In re Bradford*, No. 289-00536, Adversary No. 289-0211 (Bankr. E.D. Cal. Aug. 23, 1990); *In re Bryant*, 116 Bankr. 272, 275-276 (Bankr. D. Kan. 1990); cf. *In re Lile*, 103 Bankr. 830 (Bankr. S.D. Tex. 1989), appeal pending, No. CA-H-89-3463 (S.D. Tex.).

[5] Respondent notes (Br. in Opp. 18) that most of the provisions in the Bankruptcy Code that contain one of the trigger words in Section 106(c)—"creditor," "entity," or "governmental unit"—do not contemplate money judgments. The dissent in *Hoffman* made the same observation, 492 U.S. at 108-109, but that did not prevent the Court from granting review in *Hoffman* to decide the issue of Eleventh Amendment immunity presented there. The issue of federal sovereign immunity presented here is of equal importance. In any event, the proportion of Code provisions containing trigger words is unrelated to the frequency with which claims against the sovereign for money damages may arise. For example, Section 542(b) is one of the Code provisions that contains a trigger word and contemplates monetary awards; it authorizes the trustee to bring contract actions against any "entity." 11 U.S.C. 542(b). This provision obviously could provide a basis for innumerable claims against the government for money damages.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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